Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Joint Petition of BellSouth, SBC, and	)	
Verizon for Elimination of Mandatory	)	
Unbundling of High-Capacity Loops and	)	
Dedicated Transport	)	

MOTION TO DISMISS JOINT PETITION

NewSouth Communications, by and through its counsel, hereby files this Motion to Dismiss the Joint Petition ("Joint Petition") of BellSouth Corporation, SBC Communications, Inc., and Verizon Telephone Companies. ("Petitioners"). The Joint Petition is premature and procedurally defective and, accordingly, should be dismissed expeditiously.

I. The Petition Violates the Three-Year Quiet Period Established by Commission

In order to create stability, provide a measure of market certainty and minimize administrative burdens, the Commission adopted a national list of network elements that incumbent local exchange carriers must unbundle.[1/] The Commission recognized that there would be a need to reassess periodically the availability of network elements given the rapid changes in the telecommunications market.[2/] Nonetheless, the Commission found that *ad hoc* filings of petitions to remove unbundled network elements ("UNEs") would undermine the goals of stability, market certainty and administrative ease that prompted the adoption of a national list

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1/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("UNE Remand Order").

2/ UNE Remand Order, ¶¶ 148-149.

of UNEs in the first place. The Commission struck a balance by establishing a procedure by which it would review the list of UNEs every three years.[3/] The Commission thus established a three-year quiet period during which carriers could be certain that the UNEs identified by the Commission would continue to be available.

As the Commission explained, the three-year quiet period would "provide a measure of certainty to ensure that new entrants and fledgling competitors can design networks, attract investment capital, and have sufficient time to attempt to implement their business plans."[4/] The Commission well recognized that the filing of *ad hoc* petitions to remove elements from the list "would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers" and would "undermine the goal of implementing unbundling rules that are administratively practical to apply."[5/] It thus admonished carriers not to file petitions to remove elements from the list immediately upon adoption of the order. Instead, the Commission stated its intent to reexamine the national list of UNEs every three years. The Commission noted that the three-year period coincided with the length of many interconnection agreements between competing carriers and BOCs, and would thus provide a sufficient period of time to implement the business plans embodied in the contracts. In sum, the three-year period, the Commission found, was warranted in order to provide carriers sufficient time to implement their business plans, and provide sufficient certainty to carriers and to capital markets.[6/]

3/ UNE Remand Order, ¶¶ 149-151.

4/ UNE Remand Order, ¶ 150.

5/ UNE Remand Order, ¶ 150.

6/ There is no inconsistency between the Commission's three year period and the statutory requirement that the Commission review its rules every two years. *But see* UNE Remand Order, Separate Statement of Commissioner Harold Furchtgott-Roth at 5 (arguing that the three year review violates the statutory biennial review requirement). The Commission noted that its review would probably begin after about two years in order to provide sufficient time to complete the review by the third year. UNE Remand Order, ¶ 151, n.269. The Joint Petitioners have not invoked this triennial review procedure and have jumped the gun even for a review that would begin two years after the effective date of the rules.

The BOCs filed the Joint Petition in blatant disregard of the review procedure established by the Commission. Not even a year has elapsed since some of the UNEs that the BOCs want to remove from the list first became available. The UNE Remand Order became effective for most UNEs on February 17, 2000.[7/] For many UNEs not previously identified by the Commission, however, including dark fiber loops and dark transport UNEs that are targeted for removal in the Joint Petition, the UNE Remand Order did not become effective until May 18, 2000.[8/] Despite the Commission's admonition against *ad hoc* petitions to remove UNEs from the national list, and without so much as a hint of acknowledgement that the Commission established an orderly procedure by which to review every three years which elements must be unbundled, the Petitioners on April 5, 2001, asked for the expeditious removal of high capacity loops and dedicated transport.[9/]

The Commission's review procedures are grounded in sound policy rationale. In adopting the three-year quiet period, the Commission noted that many of the initial interconnection agreements that were negotiated following enactment of the 1996 Act were expiring and would be renegotiated.[10/] The Commission anticipated that carriers would incorporate the requirements of the UNE remand order into these new contracts.[11/] The three-year period was designed to give carriers time to implement the contracts and begin to realize their business plans predicated on those contracts. The Joint Petition destroys the ability of

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7/ The UNE Remand Order Ordering Clause provides that, with certain exceptions, the rules adopted in the UNE Remand Order shall become effective thirty days after publication in the Federal Register. UNE Remand Order, ¶ 526. The rules were published in the Federal Register on January 18, 2000. Revision of the Commission's Rules Specifying the Portions of the Nation's Local Telephone Networks that Incumbent Local Telephone Companies Must Make Available to Competitors, 65 Fed. Reg. 2542 (Jan. 18, 2000) (to be codified at 47 C.F.R. pt. 41).

8/ The Ordering Clause stated that the rules for unbundled dark fiber loops (51.319(a)(1)) and unbundled dark fiber transport (51.319(d)(1)(B)) would become effective 120 days after publication in the Federal Register. UNE Remand Order, ¶ 526.

9/ Joint Petition at 1, n.2.

10/ UNE Remand Order, ¶ 151.

11/ UNE Remand Order, ¶ 151.

carriers to implement these contracts fully, and undermines the market certainty the Commission sought to create.

The Petitioners contend that market changes since the record developed in the UNE Remand Order proceeding warrant removal of high capacity loops and dedicated transport from the national list of UNEs. Whatever the merits of that argument,[12/] the fact that market changes occur, even rapid changes, was well understood by the Commission. It was the likelihood of rapid market changes that prompted the Commission to adopt the three-year review procedure.[13/] Thus, claims that the market has changed do not justify disregarding the Commission's review procedure.

The Petitioners do not even address the three-year review period. Instead, they blithely ignore Commission precedent. The Commission should, therefore, dismiss the Joint Petition,[14] and it should do so expeditiously, before the Commission and industry waste valuable time and resources responding the BOCs' patently premature arguments.

II. Other Procedural Defects

The Joint Petition is procedurally defective in other ways as well. The Joint Petition requests a repeal of existing rules. The Commission's procedures governing such requests are set forth in section 1.401 of the Commission's Rules. Section 1.401 provides that "any interested party may petition the Commission for the issuance, amendment or repeal of a rule or regulation" and subsequent sections delineate the procedures to be followed in such a case.[15/] The appropriate response for the Commission to follow when it believes there is merit to such a petition is to issue a Notice of Proposed Rulemaking ("NPRM") and publish the NPRM in the

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12/ Should this motion be denied, NewSouth reserves the right to submit comments on the substantive shortcomings of the Joint Petition.

13/ UNE Remand Order, ¶ 148.

14/ *See e.g.*, 1.401(e) (allowing that premature petitions for rulemaking may be dismissed without prejudice).

15/ *See* 47 C.F.R. § 1.401(a).

Federal Register.[16/] Substantive revisions to the Commission's rules require the notice process defined by the Commission's NPRM procedures.[17/] Rather than follow the required administrative process, the Petitioners inappropriately seek to collapse into a single step -- the adoption of an order -- a process that requires two steps -- the release of a notice of proposed rulemaking and then an order.

The Joint Petition does not invoke these standard rulemaking procedures. Nor does the Joint Petition purport to be a waiver of the Commission's rules for good cause shown.[18/] In fact, the Joint Petition fails to identify any authority under which the petitioners are entitled to relief. For this reason alone, the Commission should dismiss the Joint Petition as premature and not warranting consideration for incompleteness.[19/]

Finally, the Commission may wish to take this opportunity to further elucidate the specific procedure to be used in its triennial review process. In addition to dismissing the Joint Petition, the Commission may consider establishing a process that minimizes administrative burdens and ensures that all parties have equal and sufficient time to submit evidence on the continuing need for UNEs. For example, the Commission could establish a date certain in advance of the three-year anniversary of the effective date of UNE rules to request market

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16/ *See* 47 C.F.R. § 1.407 ("If the Commission determines that the petition discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding, and notice and public procedure thereon are required or deemed desirable by the Commission, *an appropriate notice of proposed rule making will be issued.*") (emphasis added). *See also* 47 C.F.R. § 1.412(a)(1) ("Notice is ordinarily given by publication of a "Notice of Proposed Rule Making" in the Federal Register."). To avoid the notice and comment process of the NPRM, the petitioners would have to demonstrate that the proposed rule falls within one of the exempt categories of Section 1.412(b). *See* 47 C.F.R. § 1.412(b) (delineating military, naval, and foreign affairs, Commission management, interpretative rules, general statements of policy, and rules of Commission organization, procedure, or practice as matters that can be considered outside of the scope of the prior notice requirement of the NPRM); 47 C.F.R. § 1.412(c) (providing for rule changes without prior notice for "good cause"). No exceptions are claimed by the petitioners.

17/ *See, e.g.,* JEM Broadcasting v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994) (noting that a different standard of notice applies to substantive and procedural rules).

18/ *See e.g.,* 47 C.F.R. § 1.3.

19/ *See* 47 C.F.R. § 1.401(e)("Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the Petitioner.").

information via a notice of inquiry. Once it has digested this information, the Commission could issue a notice of proposed rulemaking stating its proposals for modification of the UNE list, if any, to be followed by the adoption of an order at or after the three-year anniversary. Such a procedure would be fair to all players in that it would provide notice of when information was expected and grant all stakeholders the same period of time to compile, submit and respond to market information.

III. Conclusion

For the reasons set forth above, the Commission should dismiss the Joint Petition.

Respectfully submitted,

NEWSOUTH COMMUNICATIONS

Jake E. Jennings
Vice President, Regulatory Affairs
NewSouth Center
Two N. Main Street
Greenville, SC 29061
(864) 672-5000

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, PC

Michael H. Pryor
700 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

CERTIFICATE OF SERVICE

The undersigned, Darryl Davis, a secretary with the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. hereby certifies that this 25th day of April, 2000, I have caused a true and correct copy of the foregoing **Motion to Dismiss** to be served via first-class mail:

Magalie Roman Salas*
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle Dixon*
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sarah Whitesell*
Office of Commissioner Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dorothy Attwood*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

International Transcription Services, Inc.
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554

Janice M. Myles*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Jordan Goldstein*
Office of Commissioner Ness
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sam Feder*
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Glenn Reynolds*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

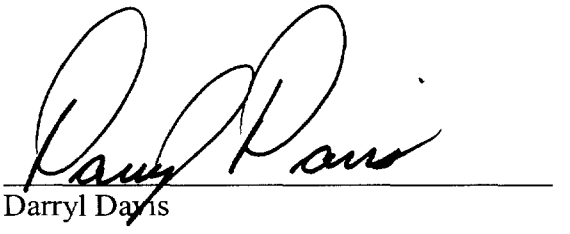
Jodie Donovan-May*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jonathon B. Banks
Richard M. Sbaratta
BellSouth Corporation
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036

Jeffrey S. Linder
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Gary L. Phillips
Roger K. Toppins
Paul K. Mancini
SBC Communications, Inc.
1401 Eye Street, N.W., Suite 1100
Washington, D.C. 20005

Michael E. Glover
Edward Shakin
Verizon Telephone Companies
1320 North Court House Road, 8th Floor
Arlington, Virginia 22201



Darryl Davis

* - Via Hand Delivey

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